

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
TRANSWORLD CORPORATION	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years 1983	:	
and 1984.	:	

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Petitioner, Transworld Corporation, P.O. Box 904, Paramus, New Jersey 07653-0904, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1983 and 1984 (File No. 805436).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 18, 1989 at 1:15 P.M., with all briefs to be filed by December 8, 1989. Petitioner appeared by Bernard G. Cappiello, Staff Vice President - Taxes. The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner filed a timely petition for hearing or request for conciliation conference with respect to notices of deficiency of corporation franchise tax.

FINDINGS OF FACT

On September 25, 1987, the Division of Taxation mailed the following notices of deficiency to petitioner, Transworld Corporation, by certified mail:

- (a) for 1983 - \$167,891.00 in tax, plus interest;
- (b) for 1983 - \$28,584.00 in tax (Metropolitan Transportation Business Tax Surcharge), plus interest;
- (c) for 1984 - \$470,170.00 in tax, plus interest; and
- (d) for 1984 - \$79,929.00 in tax (Metropolitan Transportation Business Tax Surcharge), plus interest.

Statements of audit adjustment explaining that the deficiencies were based on a "recent field audit" were also mailed to petitioner on September 25, 1987.

A document entitled "Petition For Hearing"<sup>1</sup> was prepared by Thomas F. Lombardi, petitioner's Director of Tax Research and Compliance, and Bernard G. Cappiello, petitioner's Staff Vice-President - Taxes. On Wednesday, December 23, 1987, the petition was placed in an envelope addressed to the Bureau of Conciliation and Mediation Services in Albany, New York and United States postage stamps totalling \$.90 in value were placed on the envelope.

Mr. Lombardi took the aforementioned envelope with him as he left his office at approximately 5:20 P.M. on December 23, 1987. Minutes later, he deposited the envelope in an official United States Postal Service collection box located in the lobby of 605 Third Avenue, New York, New York, the building in which petitioner's offices were then located.

Petitioner's offices were closed on Christmas Eve, Thursday, December 24, 1987. However, the office building known as 605 Third Avenue was open on that day. The next day, Friday, December 25, 1987 was Christmas Day, a legal holiday.

The envelope containing the petition was postmarked by the United States Postal Service with the date December 28, 1987, a Monday. It was received by the Bureau of Conciliation and Mediation Services in Albany on January 4, 1988.

The petition was rejected as untimely as it had been received after December 24, 1987, the ninetieth day after the mailing of the notices of deficiency, and bore a postmark later than said date.

#### CONCLUSIONS OF LAW

A. Tax Law § 1089(b) provides that a taxpayer must file a petition for redetermination of a deficiency within 90 days after the mailing of the Notice of Deficiency to the taxpayer.<sup>2</sup> Under Tax Law § 170.3-a(b), the 90-day period is tolled by the filing of a request for conciliation conference. Consequently, a taxpayer must file either a petition or a request for conciliation conference within 90 days of the issuance of the Notice of Deficiency.

B. Tax Law § 1091(a) provides that if a petition or certain other documents are delivered by United States mail after the time period specified by statute (here 90 days from the issuance of the notices of deficiency), the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery, but only if the postmark falls within the prescribed period.

C. In this case, the petition was mailed on Wednesday, December 23, 1987, the eighty-ninth day after the issuance of the notices of deficiency. Unfortunately, however, the envelope in which the petition had been mailed was either not collected from the official depository in a timely manner, or was delayed in some other way, resulting in a postmark of Monday,

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<sup>1</sup>Effective September 1, 1987, the Bureau of Conciliation and Mediation Services assumed the conference function of the former Tax Appeals Bureau, while the Division of Tax Appeals assumed that Bureau's hearing function.

<sup>2</sup>The time is extended to 150 days if the Notice of Deficiency is addressed to a person outside of the United States.

December 28, 1987. Perhaps this was due to the large volume of holiday mail which generally reaches a peak just before Christmas Day. Whatever the reason, however, it is well-settled that even if a document is deposited in a United States Postal Service box on a timely basis, the untimely postmark is the controlling factor (see, Shipley v. Commissioner, 35 TCM 1735; Nelson v. Commissioner, 42 TCM 372 [interpreting Internal Revenue Code § 7502, which is similar to Tax Law § 1091(a)]; see also, Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988).

While different rules apply for registered and certified mail, it is clear that a taxpayer who mails a document by ordinary mail assumes the risk that the postmark will bear a date which is timely under the statute. It would appear that petitioner's only recourse would be to pay the deficiencies and file a claim for credit or refund under Tax Law § 1089(c).

D. The petition of Transworld Corporation is denied and the notices of deficiency issued on September 25, 1987 are sustained.

DATED: Troy, New York  
March 29, 1990

/s/ Robert F. Mulligan  
ADMINISTRATIVE LAW JUDGE